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Supreme Court, U.S.
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No. 88-A856

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

RICKY DURHAM,
Petitioner,

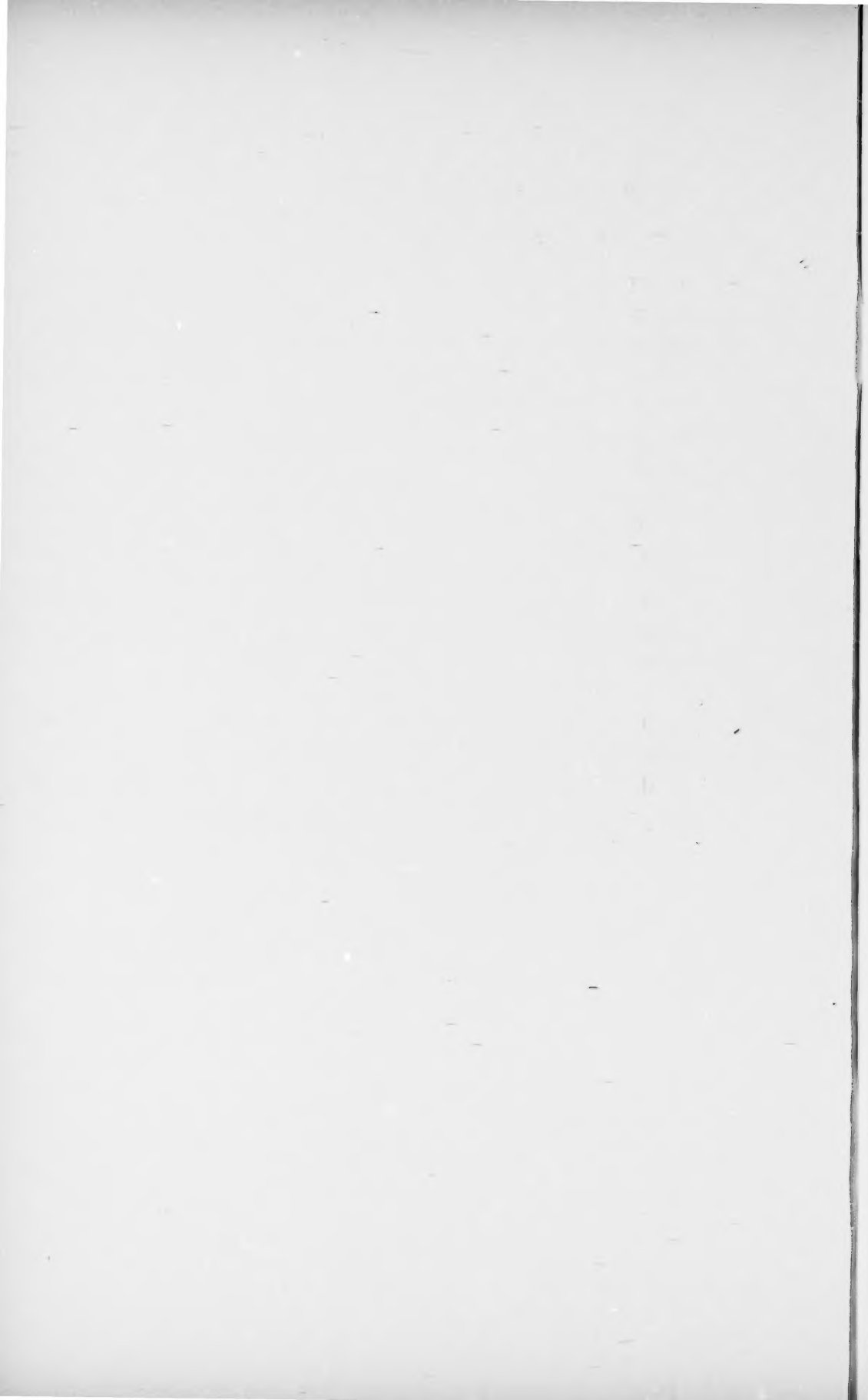
vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**PETITIONER'S APPLICATION
FOR CERTIORARI**

RICHARD H. SINDEL
Missouri Bar No. 23406
8008 Carondelet, Suite 301
Clayton, Missouri 63105
(314) 721-6040
Counsel for Petitioner



QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND HIS RIGHT TO A FAIR TRIAL WERE VIOLATED WHEN THE DISTRICT COURT REFUSED TO ALLOW PETITIONER TO CROSS-EXAMINE ZACH WALLS IN THE PRESENCE OF THE JURY CONCERNING CHARGES THAT WERE PENDING AGAINST HIM ON THE DAY OF THE MURDER, AND THE SUBSEQUENT ENTRY OF AN ORDER OF NOLLE PROSEQUI ON THOSE CHARGES.**
- II. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE GOVERNMENT WAS ALLOWED TO ELICIT IMPROPER AND INADMISSIBLE HEARSAY IN THEIR CROSS-EXAMINATION OF DEFENSE WITNESS GEORGE WALKER.**
- III. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS WERE DENIED WHEN THE COURT ADMITTED AN UNAUTHENTICATED COPY OF A LETTER INTO EVIDENCE.**
- IV. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE GOVERNMENT, IN ITS OPENING STATEMENT, REFERRED TO THE SUBSTANCE OF A WITNESS' TESTIMONY THAT WAS LATER RULED TO BE INADMISSIBLE.**
- V. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM**

WERE VIOLATED WHEN THE TRIAL COURT FAILED TO GIVE A CAUTIONARY INSTRUCTION IN RESPONSE TO THE GOVERNMENT'S INTRODUCTION OF REBUT-TAL TESTIMONY AS SUBSTANTIVE EVIDENCE AND WHEN IT ALLOWED THE GOVERNMENT TO INTER-JECT UNSUBSTANTIATED EVIDENCE OF THREATS AND PROTECTION OF THE WITNESSES FROM THE DEFEN-DANT IN ITS QUESTIONING OF A DEFENSE WITNESS.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below and Jurisdictional Statement	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Arguments	5,10,12,14,17
Conclusion	19
Index to Appendices	A-i
Appendix A	A-2
Appendix B	A-7
Appendix C	A-8
Appendix D	A-9

TABLE OF AUTHORITIES

	Page
Cases:	
UNITED STATES SUPREME COURT	
Alford v. United States, 282 U.S. 687, 51 S.Ct. 218 (1931)	9
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) ...	9
Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974)	7,8,9
Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986)	7
Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074 (1965)...	7
Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420 (1969)	16
Napue v. Illinois, 360 U.S. 264 (1959)	8
United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075 (1976)	15
United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584 (1982)	16
United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974 (1983)	9
United States v. Owens, ___ U.S. ___, 108 S.Ct. 838 (1988)	7
United States v. Young, 470 U.S. 1, 105 S.Ct. 1038 (1985)	16
UNITED STATES COURT OF APPEALS	
Burr v. Sullivan, 618 F. 2d 583 (9th Cir. 1980)	9
Carrillo v. Perkins, 723 F. 2d 1165 (5th Cir. 1984)	8,9

Grimaldi v. United States, 606 F. 2d 332 (1st Cir.), <i>cert denied</i> , 444 U.S. 971, 100 S.Ct. 465 (1979)	16
Seiler v. Lucasfilm, Ltd., 808 F. 2d 1316 (9th Cir. 1986), <i>cert. denied</i> , 108 S.Ct. 92	14
United States v. Akin, 562 F. 2d 459 (7th Cir. 1977), <i>cert. denied</i> , 435 U.S. 933, 98 S.Ct. 1509 (1978)	16
United States v. Beno, 324 F. 2d 582 (2nd Cir. 1963), <i>cert. denied</i> , 379 U.S. 880, 85 S.Ct. 147	12
United States v. Brockington, 849 F. 2d 872 (4th Cir. 1988)	15,16
United States v. Crumley, 565 F. 2d 945 (5th Cir. 1978)	7,8
United States v. DeLillo, 620 F. 2d 939 (2nd Cir. 1980), <i>cert. denied</i> , Francis v. United States, 449 U.S. 835, 101 S.Ct. 107	18
United States v. DeRosa, 548 F. 2d 464 (3rd Cir. 1977)	15,16
United States v. Durham, 868 F. 2d 1010 (8th Cir. 1989)	2
United States v. Herman, 589 F. 2d 1191 (3rd Cir. 1978), <i>cert. denied</i> , 441 U.S. 913, 99 S.Ct. 2014	11
United States v. Hernandez, 779 F. 2d 456 (8th Cir. 1985)	16
United States v. Hogan, 763 F. 2d 697 (5th Cir. 1985)	18
United States v. Johnson, 767 F. 2d 1259 (8th Cir. 1985)	16
United States v. Jones, 592 F. 2d 1038 (9th Cir. 1979), <i>cert. denied</i> , 441 U.S. 951, 99 S.Ct. 2179	16
United States v. Lopez, 575 F. 2d 681 (9th Cir. 1978)	16
United States v. Lynn, 856 F. 2d 430 (1st Cir. 1988)	9
United States v. Mayer, 556 F. 2d 245 (5th Cir. 1977)	9

United States v. McPhatter, 473 F. 2d 1356 (5th Cir.), <i>cert. denied</i> , 413 U.S. 834, 94 S.Ct. 175 (1973)	16
United States v. Morlang, 531 F. 2d 183 (4th Cir. 1975)	16
United States v. Onori, 535 F. 2d 938 (5th Cir. 1976)	9
United States v. Rogers, 549 F. 2d 490 (8th Cir. 1978), <i>cert. denied</i> , 431 U.S. 918, 97 S.Ct. 2182	17
United States v. Sawyer, 799 F. 2d 1494 (11th Cir. 1986), <i>cert. denied</i> , 107 S.Ct. 961	15,16
United States v. Schindler, 614 F. 2d 227 (9th Cir. 1980) ...	15,16
United States v. Silverstein, 737 F. 2d 864 (10th Cir. 1987)	18
United States v. Tolman, 826 F. 2d 971 (10th Cir. 1987)	15
United States v. Webster, 734 F. 2d 1191 (7th Cir. 1984) ...	18
United States v. Winston, 447 F. 2d 1236 (D.C. Cir. 1971)	12

UNITED STATES DISTRICT COURT

Seiler v. Lucasfilm, Ltd., 613 F. Supp. 1253 (D.C. Cal. 1984), <i>aff'd</i> , 797 F. 2d 1504 (9th Cir.)	13
Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182 (N.D. Cal. 1973), <i>aff'd</i> , 536 F.2d 838 (9th Cir. 1976)	14

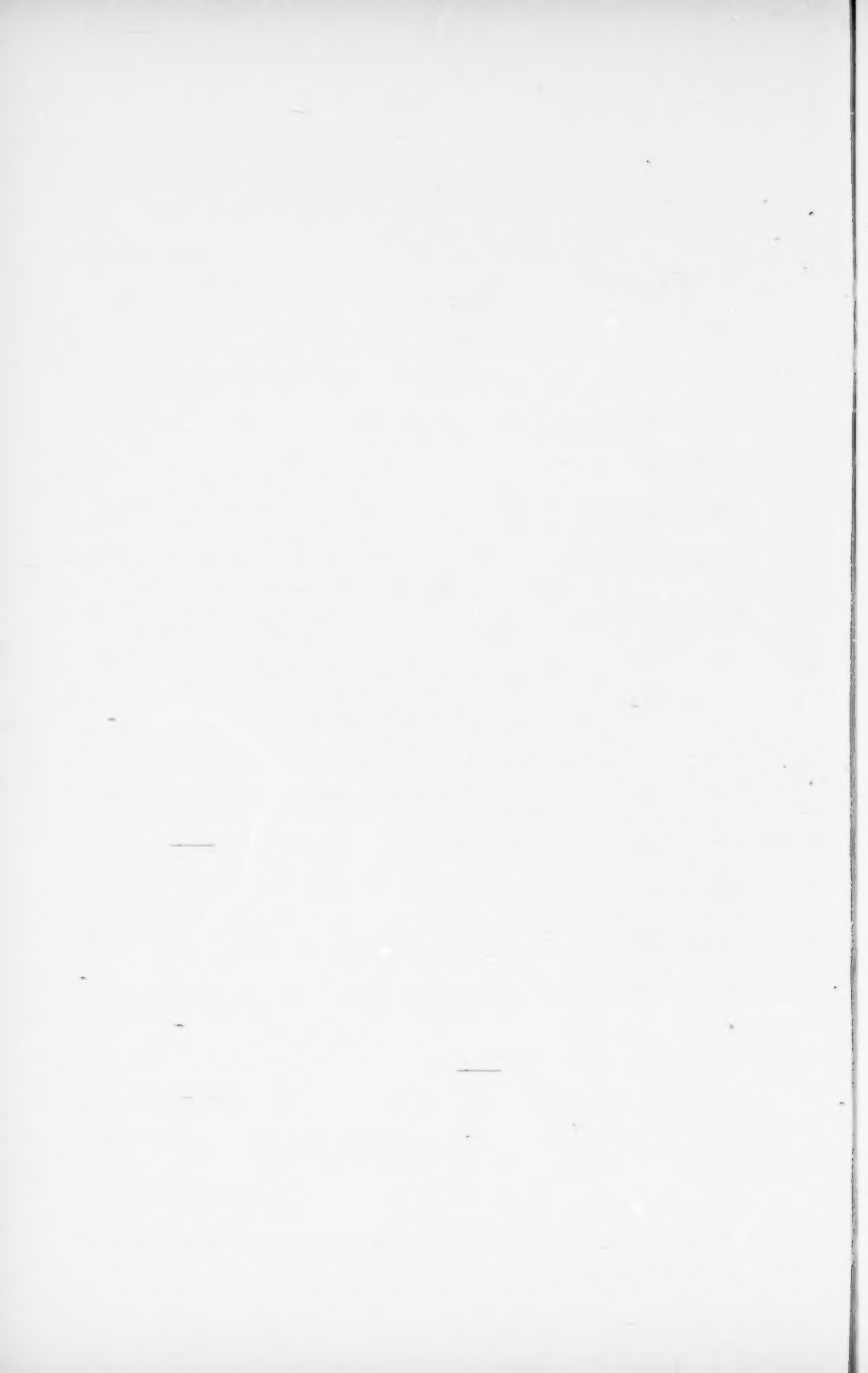
United States Constitutional Provisions

U.S. Const. Amend.	<i>passim</i>
U.S. Const. Amend. VI	<i>passim</i>

United States Statutory Provisions

18 U.S.C. §924	2
18 U.S.C. §1111	2

18 U.S.C. §1114	2
18 U.S.C. §3231	2
28 U.S.C. §1254	2
F.R.E. 103	2
F.R.E. 602	2,11
F.R.E. 801	2,11
F.R.E. 803	2,11
F.R.E. 804	2,11
F.R.E. 901	2,13
F.R.E. 1001	2,13
F.R.E. 1002	2,13
F.R.E. 1003	2,13
F.R.E. 1004	2,13,14
F.R.E. 1005	2,13
F.R.E. 1006	2,13
F.R.E. 1007	2,13
F.R.E. 1008	2,13
Fed.R.Crim.P. 52	2



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Petitioner,

vs.

UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**PETITIONER'S APPLICATION
FOR CERTIORARI**

Ricky Durham, Petitioner, prays that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of conviction of the United States District Court for the Eastern District of Missouri, Eastern Division.

OPINION BELOW AND JURISDICTIONAL STATEMENT

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on March 2, 1989, in an opinion which has been reported in *United States v. Durham*, 868 F.2d 1010 (8th Cir. 1989). The opinion is reproduced in the appendices.

On April 26, 1989, this Court (Justice Blackmun) issued an order extending the time for filing a petition for writ of certiorari to and including May 31, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amends. V and VI, 18 U.S.C. §§924, 1111, 1114, and 3231, 28 U.S.C. 1254, F.R.E. 103, 602, 801, 803, 804, 901, and 1001-1008, and Fed. R. Crim. P. 52 are included in the appendices.

STATEMENT OF THE CASE

Ricky Durham was indicted for the murder of a postal service worker and for the unlawful use of a firearm in violation of 18 U.S.C. Sections 1111, 1114 and 924(c). By way of 18 U.S.C. §3231, the district court was vested with original jurisdiction of this matter. After a jury trial in the Eastern Division of the Eastern District of Missouri, Petitioner was found guilty as charged.

The government's evidence at trial tended to show that on May 7, 1987, Kenneth Clark (hereinafter Clark), a U.S. Postal Service mail carrier, was shot four times while he was delivering mail. Clark died as a result of the gunshot wounds.

The government's theory of the case was that Clark owed the Petitioner, Ricky Durham (hereinafter the Petitioner) approximately \$1,500.00 for a cocaine debt. Clark's mother, Odessa Clark, testified that in the early summer of 1986, a man (not the Petitioner) came to her home with a letter for Clark. The letter contained threats against Clark and his mother if a debt was not repaid to the author of the letter, one "Ricky." The letter was read into evidence over the Petitioner's objection that it was not properly authenticated and that it was a copy, not the original.

Charles Durham (hereinafter Charles) testified that he was the Petitioner's nephew. In the spring of 1987, Charles was selling cocaine. He had started his career by selling drugs for the Petitioner. In 1986, Charles saw Clark in order to pick up money that Clark owed to the Petitioner. In April, 1987, the Petitioner supposedly told Charles that Clark still owed him money and if he did not pay him he would hurt him.

Charles further testified that he was told not to sell drugs out of his own car, so Charles asked his friend Zach Walls to buy a car. Walls bought a green station wagon and he and Charles shared it. About a week before May 7, 1987, Charles took the car from Walls and gave the Petitioner keys to the car.

Ida Hubbard testified that on May 7 she lived at 4444 Farlin. She allegedly saw a green station wagon drive fast through the alley about noon. The car parked across the street in front of her house. A man got out and walked toward the alley which was a few houses away. He disappeared from view and she heard four or five shots. The driver of the green car came running across the lawn to the car.

When the police interviewed Zach Walls, he gave them three different stories about the car. Walls first said that the car had been abandoned. He later told them he had been in an accident. Finally, Walls said that he gave the car to Charles Durham.

Zach Walls testified that he had known Charles Durham for over ten years. Walls had been convicted of burglary in 1983. In March, 1987, Walls bought a green station wagon with money Charles Durham gave him. Walls registered the car under his name. He and Charles both drove the car. A week or two before the mailman was killed, he gave his set of keys and the car to Charles. In April, he was at Charles's house when he heard the Petitioner say to Charles that a mailman owed him money.

The government objected to any cross-examination questions concerning charges that were pending against Walls on the day of the murder. Outside of the jury's presence, the Government stated that it had made no promises or deals with Walls. Nevertheless, the Government informed the court that felony drug charges against Walls were nolle prossed on June 25, 1987. After a voir dire of Walls, again outside of the jury's presence, the court ruled that the Petitioner could not pursue the line of questioning.

George Walker, Jr. testified that he was a letter carrier and a friend of Clark's. His route overlapped with Clark's on Margarett. During

the last week of April, 1987, a man approached him on Margareta and asked him where Kenny (Clark) was. Walker testified that the man asked him to tell Kenny that he wanted to talk to him about something. Walker saw Clark later and relayed the message. Walker saw the same man two or three times later the same week. The man asked Walker if he had given the message to Clark. Walker saw the man around noon on the day Clark was shot. The man was not the defendant.

Walker testified on cross examination that he found out who the man was after Clark was dead. Over Petitioner's objection, Walker testified that someone told him the man was Richard Stepps, a landlord or realtor.

The Government in its opening statement told the jury that it would hear evidence that Clark became angry after he received a letter from the Petitioner. The jury was also informed that they would hear that Clark called the Petitioner and told him to stay away from his mother. Petitioner's objection and request for a mistrial were overruled. During the trial and over Petitioner's objections, Barry Jones, a good friend of Clark's, testified that Clark called the Petitioner after receiving a letter from his sister supposedly written by Petitioner.

Norma Jean Ross testified for Petitioner that the day after he was released on bond, the police came to her house looking to kill him. On cross examination, the Government asked Ross if she ever told Postal Inspector J. C. Post that she was afraid the Petitioner would kill some witnesses if he knew where they were. In rebuttal, J. C. Post testified over objection that Norma Ross told him she felt the Petitioner was dangerous and that if he knew where witnesses Charles Durham and Robin Porter were, he would kill them.

After the instructions conference, the jury heard closing arguments and retired to deliberate. The jury returned guilty verdicts on both counts.

On February 24, 1988, the court sentenced the Petitioner on Count II (Unlawful Use of a Firearm) to five years imprisonment. On Count I, Murder of a Postal Service Worker, the court sentenced the Petitioner to a consecutive term of life imprisonment.

ARGUMENT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND HIS RIGHT TO A FAIR TRIAL WERE VIOLATED WHEN THE DISTRICT COURT REFUSED TO ALLOW PETITIONER TO CROSS-EXAMINE ZACH WALLS IN THE PRESENCE OF THE JURY CONCERNING CHARGES THAT WERE PENDING AGAINST HIM ON THE DAY OF THE MURDER, AND THE SUBSEQUENT ENTRY OF AN ORDER OF NOLLE PROSEQUI ON THOSE CHARGES.

Zach Walls was the owner of the green station wagon seen near the location where Kenneth Clark was shot. When questioned by police, Walls gave conflicting stories about the car. After being threatened by the police, Walls made a statement. The trial court refused to allow Petitioner to cross-examine Walls about charges that had been pending on the day of the murder. This refusal by the court denied Petitioner his sixth amendment right to confront the witnesses against him. U.S.Const.amend. VI.

Walls was cross-examined by the Defendant on the purchase of the car and the circumstances under which he heard Petitioner state that the mailman owed him money. When the Petitioner attempted to question Walls about drug possession charges that were pending when Walls gave his statement to the police, the Government objected. The Court held a voir dire of Walls out of the jury's presence to determine if the Government had promised Walls anything in exchange for his testimony. Walls stated that in May of 1987 he had a felony possession of cocaine and possession of marijuana charges pending in state court. Walls testified, "they said they was going to go down and get it taken care of and keep it." Walls later reiterated that the police said they would take care of it because he left town.

The following colloquy concerning the witnesses drug charges took place between the witness and Petitioner's attorney:

Q. Is the case still pending?

A. I guess so. I don't know. I left. I left town because I had got a threatening phone call. I don't know; they said they was going to go down and get it taken care of and keep it.

....

Q. Did you tell either the state prosecutors or the government prosecutors about that case?

A. I'm pretty sure they should know about it. They looked in my record.

Q. Did you tell them about it?

A. Did I tell them about it?

Q. Right?

A. Yes.

....

Q. But you knew you had a court date. You don't remember when the next court date was before you left town?

A. I know it was probably — I don't remember. I don't remember, I know I had a court date coming up.

Q. Did you tell the police officers investigating this case that talked to you about that court date?

A. Yes, I did.

Q. Okay. And is that when they told you they would take care of it?

A. Yes.

Q. Okay. And you didn't show up from that point on?

A. Right.

Q. And you didn't hear any more about the case?

A. Right.

The assistant United States Attorney told the court that the charges against Walls were nolle prossed on June 25, 1987. He stated that neither he nor the state prosecutor ever told Walls that his case would be taken care of in exchange for his testimony. In addition Walls testified that he was not aware whether the charges against him were still pending.

The Confrontation Clause of the sixth amendment has long been interpreted as granting the defendant an adequate opportunity to cross-examine the witnesses against him. U.S. Const.amend.VI; *United States v. Owens*, __ U.S. __, 108 S.Ct. 838, 841 (1988); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076 (1965). Cross examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-317, 94 S.Ct. at 1110.

It is not constitutionally sufficient that the defense is only allowed to question the witness out of the jury's presence. The jury is the fact-finder, and the constitution compels that the questioning be in their presence. In *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1986), the trial court precluded defense counsel from cross-examining a witness about the State's dismissal of a pending charge against him. It should be noted that in that case, as in the case at bar, the witness was voir dired outside the jury's presence. Nevertheless, the Court in *Van Arsdall* still concluded the Confrontation Clause was violated. The Court held, "By thus cutting off all questioning about an event . . . that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony," the defendants rights under the Confrontation Clause were violated. 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986)(emphasis added).

In *Carrillo v. Perkins*, 723 F.2d 1165 (5th Cir.1984), a witness, during his voir dire examination denied any agreement with the state, as such the trial court refused to allow the defendant to cross-examine the witness concerning possible charges pending against him. The Court of Appeals held that the witness' denial of an agreement during voir dire should not preclude cross-examination concerning the witness' bias. "The jury's estimate" of the reliability of a witness may be determinative of guilt or innocence, and an important factor to be considered is the witness' interest in testifying falsely. *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(emphasis added).

The Confrontation Clause is said to be violated when the defendant, in his cross-examination, is restricted in exposing "to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, 415 U.S. at 318, 94 S.Ct. at 111 (emphasis added). Thus, the crucial factor is whether the jury may be persuaded that the witness' vulnerability to prosecution persuaded the witness to slant his testimony toward assisting the Government. *Carrillo v. Perkins*, 723 F.2d 1165, 1170 (5th Cir.1984)(emphasis added).

Had Petitioner been allowed to pursue his line of questioning to Walls, the jury may have received a very different impression of one of the Government's witnesses, a key witness that helped to convict the Defendant. Had the jury been apprised of the dismissal of Wall's felony charge, they may have concluded that Walls fabricated his testimony in order to please the prosecution, especially since Walls was not aware that the charges had been nolle prossed. *Napue v. Illinois*, 360 U.S. at 270. Since Walls was not aware that the charges were no longer pending against him, a jury may have found that his fear of prosecution motivated his desire to testify against the Petitioner. *United States v. Crumley*, 565 F.2d 945, 950 (5th Cir.1978). Because of the trial court's ruling in the case at bar, the jury never heard that Walls had pending drug charges at the time of Clark's shooting. In fact, the jury was left with the impression that Walls had little, if any, connection with drugs. As such, Petitioner's denial of his right under the Confrontation Clause was not harmless beyond a

reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); See *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974 (1983).

Davis v. Alaska allows a defendant to impeach a witness by revealing "possible biases, prejudices, or ulterior motives . . . as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316, 94 S.Ct. at 1110. The District Court erred in not allowing the Petitioner to cross-examine Zach Walls concerning the cases pending against him at the time of his statement. When a prosecution witness has had prior dealings with a representative of a law enforcement agency, so that the possibility exists that his motivation was to please the prosecution in exchange for leniency, wide latitude should be granted in cross-examination. *United States v. Onori*, 535 F.2d 938 (5th Cir.1976).

It should be noted that a defendant's right to cross-examine a witness about any deals does not depend on whether any deals were actually made. *United States v. Mayer*, 556 F.2d 245, 249 (5th Cir. 1977). The Confrontation Clause has been held to be so important that "the defendant is allowed to 'search' for a deal between the government and the witness, even if there is no hard evidence that such a deal exists. . . . What tells, of course, is not the actual existence of a deal but the witness' belief or disbelief that a deal exists." *United States v. Mayer*, 556 F.2d at 249, quoting *United States v. Onori*, 535 F.2d at 945; See *United States v. Lynn*, 856 F.2d 430, 433 (1st Cir.1988); *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir.1980). It is important that cross-examination be used to ferret out a witnesses desire to please the prosecution. This desire may be subconscious and not even apparent to the witness. *Carrillo v. Perkins*, 723 F.2d 1165, 1169-70 (5th Cir.1984). Cross-examination for bias should be permitted even though the defendant cannot state what facts will be developed. *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 219 (1931).

This error was prejudicial, and cannot be said to be harmless beyond a reasonable doubt. Wall's car was seen near the shooting. Walls gave conflicting stories to the police and did not give an

acceptable statement until he was threatened. Walls did not mention the Petitioner's statement about the mailman until the police asked him if he heard the defendant say anything about a mailman. Walls had a reason to protect his friend Charles and a reason to protect himself.

The fact that the charges against Walls were dismissed was prima facie proof that Walls received some benefit. The defendant had the right to probe Walls *in the jury's presence* for bias and expose any motive for Walls to cooperate with the police. In addition, the fact that Walls was not aware that the charges against him had been dismissed was alone reason enough for him to fabricate his statement and testimony. The cutting off of all questioning pertaining to Wall's pending charges violated the Petitioner's rights under the Confrontation Clause of the sixth amendment. This Court should accept certiorari to decide this important issue.

ARGUMENT

II.

PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE GOVERNMENT WAS ALLOWED TO ELICIT IMPROPER AND INADMISSIBLE HEARSAY IN THEIR CROSS-EXAMINATION OF DEFENSE WITNESS GEORGE WALKER.

Petitioner's theory of the case was that he had been mistakenly identified as the offender and that an unknown person was responsible. Defense witness George Walker testified that a man had been persistently asking for Clark the week before the shooting in the neighborhood where Clark was shot. In addition, Mr. Walker testified that this individual was inquiring as to the victim's whereabouts in the same neighborhood, at approximately the same time that Clark was shot. Mr. Walker confirmed the fact that this individual was not the Petitioner. On cross-examination the Government was allowed, over Petitioner's objection, to elicit hearsay testimony that Walker found out from another individual that the man was a landlord or realtor.

This hearsay served to prejudicially and improperly rebut the legitimate defense theory, thus prejudicing the Defendant's rights to due process under the fifth amendment to the United States Constitution and his rights to confront the witnesses against him under the sixth amendment. U.S. Const. amends. V and VI.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." F.R.E. 801(c). The above testimony which the Court permitted the Government to elicit was a classic example of hearsay. Furthermore, none of the exceptions to the hearsay rule outlined in F.R.E. 803 and 804 are applicable. The Government continued in its improper use of this testimony when it used this hearsay substantively in its closing argument.

This hearsay violation needs no authority. The Court allowed Walker to testify about what someone else told him concerning the identity of the individual who had been looking for Clark and about what the individual wanted. This evidence was also inadmissible under F.R.E. 602 ("[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.")

The Government should not have been allowed to introduce this hearsay testimony of George Walker. The Government contends that the Petitioner "opened the door" on the subject, and that they then derive the right to introduce otherwise inadmissible evidence. This proposition by the Government should not be tolerated in these circumstances. The Government had an adequate remedy available - they should have objected to the original testimony of Mr. Walker on direct examination. The Government should not be allowed to introduce inadmissible evidence through the "back door" by purposely taking advantage of a situation where their proper remedy would be by objection. They should not be rewarded for their failure to object. *United States v. Herman*, 589 F.2d 1191, 1197 (3rd Cir.1978), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2014.

In responding to the Government's theory that since the Defendant "opened the door", they can then introduce this evidence in the entirety, not merely for impeachment purposes, but in truth's interest, the United States Court of Appeals for the District of Columbia Circuit approved the following reasoning: "This business about 'opening the door' is a much overused issue and it carries with it an oversimplification. Opening the door is one thing. But what comes through the door is another. Everything cannot come through the door (citations omitted)." *United States v. Winston*, 447 F.2d 1236, 1240 (D.C.Cir. 1971). The Government is attempting to use this doctrine as a rule for the injection of prejudice. This is clearly not permissible. *Id.*

It makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by 'opening the door' so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors. In short, a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

United States v. Beno, 324 F.2d 582, 588 (2nd Cir.1963), *cert. denied*, 379 U.S. 880, 85 S.Ct. 147.

From the foregoing errors of the trial Court, and from the United States Court of Appeal's affirmation of it's verdict, this Court should grant this Petition for a Writ of Certiorari.

ARGUMENT

III.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS WERE DENIED WHEN THE COURT ADMITTED AN UNAUTHENTICATED COPY OF A LETTER INTO EVIDENCE.

The Government, over Defendant's objection, was allowed to introduce into evidence, a letter given to Kenneth Clark's mother in 1986. The letter read as follows:

K.C., Hey my brother of the human race which bins our together as kins. This is a scribe from the brother who you owe's that \$1500 big ones. Don't think for a second that it's forgotten or accepted as a lost. Because when I see you it will be found. See I know more about you than you because I does my homework well. And going back to the penitentiary don't mean shit to a starving person like me. So my brother for your sake and your mom's please call my and make plans to pay me my money. Because a warrant is out for your head. Call me as soon as possible. Ricky.

The Petitioner objected to the letter on the grounds that it was not properly authenticated and that it was a copy. The letter was purported to have been written by "Ricky." The Defendant's name was Ricky. There was nothing else to connect it up with the Defendant. Clark's mother testified that the Defendant was not the deliverer of the letter. The common name "Ricky," cannot serve to authenticate the contents of the letter and link it to the Defendant. F.R.E. 901(a).

This letter was improperly admitted into evidence since the Government failed to comply with the Best Evidence Rule. F.R.E. 1001-1008. The letter introduced into evidence was a copy of the original letter. The Petitioner succeeded in raising a genuine question as to the authenticity of the original, and under the circumstances, considering the importance of the letter, it would be unfair to admit the duplicate in lieu of the original. F.R.E. 1003. The contents of the letter were inflammatory and prejudicial. The letter threatened the lives of Clark and his mother if a debt was not paid. This was the only evidence providing a motive to kill Clark except for alleged statements made by the Petitioner to Charles and Zach Walls. The admission of the letter damaged the Petitioner's chances for a fair trial. U.S.Const.amend.V.

In introducing this copy, the Government also failed to carry their burden in showing that they did not lose or destroy the original document in bad faith. F.R.E. 1004; *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316 (9th Cir.1986), *cert. denied*, 108 S.Ct. 92. Where the missing original is central to the case, a greater burden of proof is required than

where the original is only involved collaterally. *Seiler v. Lucasfilm, Ltd.*, 613 F.Supp.1253, 1261 (D.C.Cal.1984), *aff'd*, 797 F.2d 1504 (9th Cir.). The proper standard under F.R.E. 1004 in such a case is the "more probable than not" standard.¹*Id.* Since the Government did not meet the preliminary requirements of F.R.E. 1004, the letter should not have been allowed into evidence by the Court. As such, it's admission damaged Petitioner's chances for a fair trial. U.S.Const.amend. V and VI.

From the foregoing errors of the trial Court, and from the United States Court of Appeal's affirmation of it's verdict, this court should grant this Petition for a Writ of Certiorari.

ARGUMENT

IV.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE GOVERNMENT, IN ITS OPENING STATEMENT, REFERRED TO THE SUBSTANCE OF A WITNESS' TESTIMONY THAT WAS LATER RULED TO BE INADMISSIBLE.

The Government, in its opening statement, told the jury that it would hear evidence that Clark became angry after he received a letter from the Petitioner. The Government continued, "He [then] went and called Ricky Durham and told him to stay away from his mother, that he would pay the money." In response to the Government's statements, the Defendant objected and moved for a mistrial. The District Court denied this request. Later, during the direct testimony of Barry Jones, Jones testified that after Clark read a letter signed by Ricky, he

¹It should be noted that there is even authority for a more stringent standard of proof requiring that the proponent show that there is "no reasonable probability" that the original has been purposely suppressed. *Seiler v. Lucasfilm, Ltd.*, 613 F.Supp. 1253, 1261 (D.C. Cal. 1984), *citing Von Brimer v. Whirlpool Corp.* 362 F.Supp. 1182, 1187 (N.D. Cal. 1973), *aff'd* 536 F.2d 838 (9th Cir. 1976).

went to a pay phone to call the Defendant. In response to the Defendant's objection, the Court ruled that the witness could only testify about the facts leading up to the phone conversation, but not to the contents of the conversation. The Defendant then renewed his request for a mistrial based on the fact that the Government had already revealed the contents of the conversation in its opening statement. The Court denied the motion for mistrial. As a result, Defendant was deprived of a fair trial, his right to due process of law under the Fifth Amendment of the United States Constitution, and his sixth amendment right to confront the witnesses against him. U.S.Const.amend. V and VI.

The purpose of an opening statement is to assist the jury in its understanding of the case by presenting them with a brief outline. "It is not to poison the jury's mind against the defendant, and it is certainly not to recite items of highly questionable evidence." *United States v. DeRosa*, 548 F.2d 464, 470 (3rd Cir.1977); *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir.1988). Since the admissibility of the predicated evidence was sufficiently questionable, it was improper to refer to it prior to an indication of admissibility from the trial court. *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir.1988). Considering the narrow purpose and scope of opening arguments, the Government's reference to inadmissible evidence amounted to prosecutorial misconduct, *United States v. DeRosa*, 548 F.2d 464, 471 (3rd Cir.1977), citing *United States v. Dinitz*, 424 U.S. 600, 612, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976)(concurring opinion), and was highly improper. *United States v. Sawyer*, 799 F.2d 1494, 1507 (11th Cir.1986), *cert. denied*, 107 S.Ct. 961. "While prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch, or spite." *United States v. Schindler*, 614 F.2d 227, 228 (9th Cir.1980).

When the Government makes a statement during opening argument that is not later substantiated at trial because of its inadmissibility, the impact of that statement on the trial in general must be assessed. *United States v. Tolman*, 826 F.2d 971, 973 (10th Cir.1987);

United States v. Akin, 562 F.2d 459, 466 (7th Cir.1977), *cert denied*, 435 U.S. 933, 98 S.Ct. 1509, 55 L.Ed.2d 531 (1978); *Grimaldi v. United States*, 606 F.2d 332, 339-40 (1st Cir.), *cert denied*, 444 U.S. 971, 100 S.Ct. 465, 62 L.Ed.2d 386 (1979); *United States v. McPhatter*, 473 F.2d 1356, 1359 (5th Cir.), *cert denied*, 414 U.S.834, 94 S.Ct. 175, 83 L.Ed.2d 69 (1973). Considering the importance that this conversation and its implicit identification of the Petitioner, the improper remarks prejudicially affected the defendant's substantial rights to a fair trial. *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir.1988); *United States v. Hernandez*, 779 F.2d 456, 458 (8th Cir.1985).

It should be noted that many of the Courts which have found prosecutorial misconduct in referring to questionably admissible evidence during opening arguments, but have still affirmed the Defendant's conviction, have done so based on the fact that the Defendant neither objected nor asked for a mistrial during the opening statement remark. *United States v. Brockington*, 849 F.2d 872 (4th cir.1988); *United States v. Sawyer*, 799 F.2d 1494 (11th Cir.1986), *cert. denied*, 107 S.Ct. 961; *United States v. Johnson*, 767 F.2d 1259 (8th Cir.1985); *United States v. Schindler*, 614 F.2d 227 (9th Cir.1980); *United States v. DeRosa*, 548 F.2d 464 (3rd Cir.1977); *United States v. Lopez*, 575 F.2d 681 (9th Cir.1978). In the case at bar, the Defendant did object and request a mistrial during the Government's opening statement remarks and also when the Government attempted to introduce that evidence in its case in chief.

In the case at bar, the Defendant was prejudiced as a result of the Government's improprieties which resulted in a miscarriage of justice. He was denied his right to a fair trial, due process and his right to confront the witnesses against him. U.S.Const.amend. V and VI. As such this Court should grant Petitioner's Writ of Certiorari. *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1 (1985); *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 1592 n.14, 71 L.Ed.2d 816 (1982); *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); *United States v. DeRosa*, 548 F.2d 464 (3rd Cir.1977); *United States v. Jones*, 592 F.2d 1038 (9th Cir.1979), *cert. denied*, 441 U.S. 951, 99 S.Ct. 2179.

ARGUMENT

V.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE TRIAL COURT FAILED TO GIVE A CAUTIONARY INSTRUCTION IN RESPONSE TO THE GOVERNMENT'S INTRODUCTION OF REBUTTAL TESTIMONY AS SUBSTANTIVE EVIDENCE AND WHEN IT ALLOWED THE GOVERNMENT TO INTERJECT UNSUBSTANTIATED EVIDENCE OF THREATS AND PROTECTION OF THE WITNESSES FROM THE DEFENDANT IN ITS QUESTIONING OF A DEFENSE WITNESS.

The Government improperly cross-examined defense witness Norma Ross with a statement she allegedly made to a postal inspector. Ross testified on direct examination that the police came to her house looking to kill the defendant. On cross-examination, the Government interjected evidence of threats and protection of the witnesses from the defendant in its questioning of Ross. The Government asked Ross if she ever told postal inspector Post that she was afraid the defendant would kill certain potential witnesses if he knew where they were. The Government also asked Ross if she discussed her daughter being in protective custody with Inspector Post. In rebuttal, the Government call Inspector J.C. Post who testified that Ross told him she felt the defendant was dangerous and if he knew where those witnesses were, he would kill them. The jury was not instructed that the testimony of inspector Post should only be used to determine the credibility of Ross, and not as substantive evidence.

There are several requirements which govern the use of prior inconsistent statements, one of the most important is that the Court adequately instruct the jury about the limited purpose for which the prior inconsistent statement is admitted. *United States v. Rogers*, 549 F.2d 490, 495-498 (8th Cir.1978), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2182. No cautionary instruction was given in the case at bar. In response to the Petitioner's objection to the introduction of the rebuttal

evidence of prior inconsistent statements, and out of the jury's hearing, the trial judge stated that he would admit this rebuttal "for impeachment purposes only and that is the impeachment of the statement of one of the witnesses for the defendant who was Norma Ross. So we need to keep it in evidence only for that purpose." From that statement, the Petitioner could reasonably infer that the trial court would also instruct the jury on the purpose of rebuttal and the introduction of the prior inconsistent statements. As such, his failure to object and request a cautionary instruction in the presence of the jury as to this testimony was not necessary. Even if the Court sees fit to consider this point under the plain error rule, the danger that the uninstructed jury relied on the impeaching statements as substantive proof is great, and as such Petitioner was unfairly prejudiced. *United States v. Hogan*, 763 F.2d 697, 703 (5th Cir.1985); F.R.E. 103(d); Fed.R.Crim.P. 52(b).

In addition, the threat evidence which the Government introduced, should not have been admitted. As a general rule, this type of evidence can only be introduced in "exceptional circumstances which can be characterized as fair response to affirmative actions by the defense which invite introduction of the threat evidence." *United States v. DeLillo*, 620 F.2d 939 (2nd Cir.1980), *cert. denied*, *Francis v. United States*, 449 U.S. 835, 101 S.Ct. 107 (citations omitted). Such is not the case at bar. "The Government may not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony." *Id.* at 946; *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1987); *United States v. Webster*, 734 F.2d 1191 (7th Cir.1984); *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir.1975).

For the foregoing reasons, this Court should grant Petitioner's Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

**RICHARD H. SINDEL,
Missouri Bar No. 23406
Attorney for Petitioner
8008 Carondelet, Suite 301
St. Louis, Missouri 63105
314/721-6040**

APPENDIX

INDEX TO APPENDICES

Appendix A (<i>United States v. Ricky Durham</i> , __ F.2d __ (8th Cir. 1989)).....	A-1
Appendix B (Order extending time in which to file Petition for Writ of Certiorari).....	A-7
Appendix C (United States Constitutional Provisions)	A-8
Appendix D (United States Statutory Provisions)	A-9



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-1390

United States of America,
Appellee,

v.

Ricky Durham,
Appellant.

Appeal from the United States District Court for the Eastern
District of Missouri.

Submitted: December 12, 1988

Filed: March 2, 1989

Before McMILLIAN and BEAM, Circuit Judges, and Whipple,*
District Judge.

BEAM, Circuit Judge.

Ricky Durham was convicted by a jury of the first degree murder of a United States Postal Service Mail Carrier who was engaged in the performance of his duties¹ and the use of a firearm in the commission

* The HONORABLE DEAN WHIPPLE, United States District Judge for the Western District of Missouri, sitting by designation.

¹A violation of 18 U.S.C. §§ 1111 and 11114.

of a crime of violence.² On appeal, Durham urges reversal of the district court³ on numerous grounds. We need address only the following claims in detail: (1) that the government should not have been allowed to use hearsay evidence during cross-examination of a witness; (2) that it was error to admit a copy of a threatening letter received by the victim's mother; and (3) that the court improperly restricted cross-examination of a witness. We affirm.

I. BACKGROUND

Kenneth Clark, the victim, purchased cocaine from Durham over a period of time and was indebted to Durham for the price of the drugs. Approximately one year before the murder, Clark's mother received a letter. The letter, directed to "K.C.," made reference to a debt of fifteen hundred dollars, stated that "a warrant is out for your [Clark's] head," and was signed "Ricky." The letter was given to the police who made a xeroxed duplicate which was given to Clark sister. The original of the letter cannot be located. Upon receipt of the letter, Clark disappeared for a time. When Clark reappeared, he entered a drug rehabilitation program.

At approximately 11:00 a.m. on May 7, 1988, Durham arrived at the home of Durham's nephew, Charles Durham, and the nephew's girlfriend, Robin Porter. Later that same morning, Durham left the home with a gun and drove away in a green station wagon. In the early afternoon of that same day, Clark was shot to death while he was delivering mail on his route.

Mary Perry heard shots and saw a man who looked like Durham entering an alley. Ida Hubbard observed Durham enter the alley and drive away in a green station wagon. That same day, Durham was picked up at his mother's home. The green station wagon was discovered at the home of Durham's mother. A telephone number taken from the victim's wallet was traced to the home of the defen-

² A violation of 18 U.S.C. § 924(c).

³ The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

dant's mother. The green station wagon was registered to Zach Walls, a friend of Durham's nephew. At the direction of Durham, the station wagon was purchased by Durham's nephew for use in the sale of drugs. Durham's nephew loaned the station wagon to Durham about one week before the murder.

Durham was indicted on two counts, for murder of a United States Postal Service Mail Carrier and unlawful use of a firearm in the commission of a felony. As indicated, a jury found Durham guilty of both offenses. He was sentenced to five years incarceration for the firearms violation and to life imprisonment for the murder, the sentence of life imprisonment is to run consecutively with the five-year sentence. This appeal followed.

II. DISCUSSION

A. Cross-examination of George Walker

On direct examination during defendant's case-in-chief, George Walker, a co-worker of Clark's, testified that a man approached him on numerous occasions, including the day of the murder, asking Walker to have Clark contact him. During cross-examination, the government elicited testimony from Walker that Walker found out from someone else that the man was a landlord or a realtor. Durham asserts that this was inadmissible hearsay and that it prejudiced him because it rebutted his theory that someone else committed the murder.

"The doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination." *United States v. Lum*, 466 F.Supp. 328, 334 (D. Del.) (citations omitted), *aff'd without opinion*, 605 F.2d 1198 (3d Cir. 1979). "The doctrine * * * is limited to testimony that might explain or contradict the testimony offered by the opposing party on direct examination; it cannot be 'subverted into a rule for injection of prejudice.'" *Id.* at 335 (quoting *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)).

Here, Durham's direct examination elicited the fact that a man inquired of Clark's whereabouts. Without more, this could lead the jury to believe that this man murdered Clark. Therefore, it was necessary for the government to clear up this impression, if possible, and show the jury that the man was looking for Clark to lease or sell him property. See *United States v. Womochil*, 778 F.2d 1311, 1315 (8th Cir. 1985) (finding that it was no abuse of discretion to allow the government to clear up a false impression created on cross-examination). Under the circumstances, we conclude that the cross-examination of Walker was proper.

B. The Letter

For two reasons, Durham objects to the introduction of a copy of the threatening letter given to Clark's mother. Durham argues that there was nothing to link him to the letter. Additionally, Durham contends that the letter was inadmissible because it was a copy. We address each contention in turn.

Fed. R. Evid. 901(a) provides that "authentication * * * is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." It is well settled that authentication can be established by circumstantial evidence. See *United States v. Helm*, 532 F.2d 641, 645 (8th Cir.), cert. denied, 429 U.S. 846 (1976). Furthermore, in similar circumstances, courts have held threatening letter properly authenticated by circumstantial evidence. See *People v. Roby*, 145 Mich. App. 138, 141, 377 N.W.2d 366, 368 (1985); *Commonwealth v. Brooks*, 352 Pa. Super. 394, 395-99, 508 A.2d 316, 318-22 (1986).

Here, we are satisfied that Durham authored the letter. Clark purchased cocaine from Durham. Zach Walls, a friend of Durham's nephew, overheard Durham state that the mailman owed him money. Moreover, Durham's nephew was instructed to get the money from Clark. Later, Durham told his nephew that Clark owed him money and was avoiding him and that Durham would have to hurt Clark. The letter itself refers to the debt. Additionally, the letter was signed "Ricky" which is Durham's first name.

Durham next argues that it was improper to admit a copy of the letter into evidence. Clark's mother and sister, who both read the original letter, testified that the copy accurately reflected the contents of the original letter. Their testimony satisfied Fed. R. Evid. 901(b)(1) which permits authentication by "testimony of a witness with knowledge * * * that a matter is what it is claimed to be."

We conclude that a copy of the threatening letter was properly received into evidence.

C. Cross-examination of Zach Walls

The trial court refused to allow Durham to cross-examine Zach Walls about charges that had allegedly been dismissed in exchange for Walls' testimony. Durham asserts that this refusal denied him his sixth amendment right to confront witnesses against him.

"Trial judges retain broad discretion insofar as the confrontation clause is concerned to limit the scope of cross-examination based on concerns of harassment, prejudice, confusion of the issues or interrogation that is repetitive or only marginally relevant." *United States v. Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988) (citations omitted). "A trial court's decision to limit cross-examination will not be reversed 'unless there has been a clear abuse of discretion and a showing of prejudice to defendant.'" *Id.* (quoting *United States v. Lee*, 743 F.2d 1240, 1249 (8th Cir. 1984)).

The trial court conducted a voir dire examination outside the presence of the jury to permit Durham to determine if Walls had made a "deal" with the prosecution. During cross-examination, Walls denied, repeatedly, that a promise had been made in exchange for his testimony. The government's attorneys also denied the existence of any such agreement.

Given this evidence, we hold that the restriction on cross-examination did not violate Durham's rights of confrontation.

III. CONCLUSION

We have carefully examined all other issues raised by Durham and find them to be without merit. For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 88-A856

**Ricky Durham,
Applicant**

v.

United States

**ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 31, 1989.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 26th
day of April, 1989.

APPENDIX C

U.S.Const.amend. V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land of naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S.Const.amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense

APPENDIX D

Fed.R.Evid. 103

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Fed.R.Evid. 801

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty or perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

F.R.Evid. 602

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

F.R.Evid. 803

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memoranda, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information

or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, gener-

ally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history,

or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

F.R.Evid. 804

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the

case of a hearsay exception under subdivisions (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, di-

voice, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

F.R.Evid. 901

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Fed.R.Evid. 1001

Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Fed.R.Evid. 1002

Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Fed.R.Evid. 1003

Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Fed.R.Evid. 1004

Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if -

- (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
- (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Fed.R.Evid. 1005

Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with foregoing cannot be obtained by the exercise of

reasonable diligence, then other evidence of the contents may be given.

Fed.R.Evid. 1006

Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1007

Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Fed.R.Evid. 1008

Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Fed.R.Crim.P. 52

Harmless Error and Plain Error

(a) **HARMLESS ERROR.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **PLAIN ERROR.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

18 U.S.C. §924

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than \$5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.

(c) Whoever -

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than

one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed for the commission of such felony.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

18 U.S.C. §1111

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned any term of years or for life.

18 U.S.C. §1114

Whoever kills or attempts to kill any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation, of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the Secret Service or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any member of the Coast Guard, any employee of the Coast Guard assigned to perform investigative, inspection or law enforcement functions, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control of eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions, any officer or employee of, or assigned to duty in, the field of service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property

of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor or of the Department of the Interior, or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Federal Communications Commission performing investigative, inspection, or law enforcement functions, or any officer or employee of the Veterans' Administration assigned to perform investigative or law enforcement functions, or any United States probation or pretrial services officer, or any United States magistrate, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(f) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section, any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration, or any other officer, agency, or employee of the United States designated for coverage under this section in regulations issued by the Attorney General engaged in or on account of the performance of his official duties, or any officer or employee of the United States or any agency thereof designated to collect or compromise a Federal claim in accordance with sections 3711 and 3716-3718 of title 81 or other statutory authority shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

18 U.S.C. §3231

The district court of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
- (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be send up for decision of the entire matter in controversy.



2

No. 89-264

Supreme Court, U.S.

FILED

OCT 16 1989

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICKY DURHAM, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

207

QUESTIONS PRESENTED

1. Whether petitioner should have been allowed to cross-examine a government witness about state drug charges against that witness that had been dismissed prior to petitioner's federal trial.

2. Whether the district court properly admitted hearsay evidence from a defense witness on the government's cross-examination in response to evidence elicited by petitioner from the same witness on his counsel's direct examination.

3. Whether a letter admitted into evidence was properly authenticated, and whether a copy of the letter was properly admitted in lieu of the missing original.

4. Whether the district court should have granted a mistrial when the prosecutor in his opening statement referred to evidence that the district court subsequently excluded.

5. Whether the district court, after admitting certain rebuttal evidence, erred in not giving the jury a cautionary instruction when petitioner failed to request one.



TABLE OF CONTENTS

Opinion below	Page 1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>Carrillo v. Perkins</i> , 723 F.2d 1165 (5th Cir. 1984)	8
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	4
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	9
<i>Frazier v. Cupp</i> , 394 U.S. 731 (1969)	14
<i>Greer v. Miller</i> , 483 U.S. 756 (1987)	16
<i>Huddleston v. United States</i> , 485 U.S. 681 (1988)	12
<i>United States v. Briggs</i> , 457 F.2d 908 (2d Cir.), cert. denied, 409 U.S. 986 (1972)	15
<i>United States v. Brockington</i> , 849 F.2d 875 (4th Cir. 1988)	14
<i>United States v. Cerone</i> , 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972)	15
<i>United States v. Chan An-Lo</i> , 851 F.2d 547 (2d Cir.), cert. denied, 109 S. Ct. 493 (1988)	13
<i>United States v. Leight</i> , 818 F.2d 1297 (7th Cir.) cert. denied, 108 S. Ct. 356 (1987)	13
<i>United States v. Mayer</i> , 556 F.2d 245 (5th Cir. 1977)	9

	Page
<i>United States v. Onori</i> , 535 F.2d 938 (5th Cir. 1976)	9
<i>United States v. Russell</i> , 712 F.2d 1256 (8th Cir. 1983)	16

Constitution, statutes and rules:

U.S. Const.: Amend. VI (Confrontation Clause)	3, 4, 5
18 U.S.C. 924(c)	2
18 U.S.C. 1111	2
Fed. R. Evid.:	
Rule 104(b)	12
Rule 105	16
Rule 608(b)	7
Rule 1003	13

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A6, is reported at 868 F.2d 1010.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1989. On April 26, 1989, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including May 31, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Eastern District of Missouri convicted petitioner of murdering a United States mail carrier in the performance of his duties, in violation of 18 U.S.C. 1111, and using a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to consecutive terms of five years' imprisonment for the firearms violation and life imprisonment for the murder. The court of appeals affirmed.

1. Petitioner shot and killed United States mail carrier Kenneth Clark because Clark had failed to pay a cocaine debt to petitioner. At the time he was shot, Clark was delivering the mail on his route in St. Louis, Missouri. Pet. App. A2.

At trial the government introduced the testimony of a school teacher who saw petitioner shoot Clark; a woman who saw petitioner flee the murder scene and speed off in a green station wagon; another woman who saw petitioner obtain a gun shortly before the shooting; two witnesses who saw petitioner in the green station wagon on the day of the murder; a friend of Clark's who knew that Clark owed petitioner money for past cocaine purchases; and two witnesses to whom petitioner admitted killing Clark. The government offered additional evidence to establish that petitioner fled from St. Louis to Nevada after the shooting and gave a false name when he was arrested. The government also introduced a copy of a letter from "Ricky" threatening Clark if he did not pay a debt. Pet. App. A2-A3; Gov't C.A. Br. 1C-1J.

2. The court of appeals affirmed petitioner's convictions. First, it rejected petitioner's argument that the government improperly elicited hearsay evidence from defense witness George Walker. On direct examination,

petitioner's counsel had elicited testimony from Walker that prior to Clark's murder Walker had been approached by an unidentified person who said he was looking for Clark. The court held that by offering that evidence petitioner had "open[ed] the door" to the government's cross-examination inquiring as to that person's identity. Pet. App. A3-A4. Second, the court ruled that a threatening letter to Clark was properly admitted into evidence. From testimony that Clark owed petitioner money for prior cocaine purchases and from the fact that the letter was signed by "Ricky," the court determined that the jury could reasonably conclude that the letter was written by petitioner. In addition, the court held that a copy of the letter was admissible in lieu of the missing original because Clark's mother and sister both testified that the copy accurately reflected the contents of the original letter they had seen. *Id.* at A4-A5. Third, the court ruled that the district court properly prevented petitioner from cross-examining government witness Zach Walls concerning drug charges against him that state authorities had dismissed before petitioner's federal trial began. The court found that there was no evidence to support petitioner's speculation that the state charges may have been dismissed in exchange for Walls' federal testimony. Accordingly, the court held that the district court's "restriction on cross-examination did not violate [petitioner's] rights of confrontation." *Id.* at A5.

ARGUMENT

1. Petitioner contends that the district court violated his rights under the Confrontation Clause when it prevented him from cross-examining prosecution witness Zach Walls about state drug charges that were dismissed prior to the trial in this case. Pet. 5-10.

The Sixth Amendment Confrontation Clause entitles a defendant to cross-examine a prosecution witness about the witness's motivation for testifying and his possible bias against the defendant. *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). The confrontation right includes the opportunity to show that a prosecution witness testified for the government in exchange for the dismissal of criminal charges. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

In this case, the district court allowed petitioner to cross-examine Walls on several matters going to Walls' motivation for testifying and his possible bias against petitioner. First, petitioner's counsel probed whether Walls was testifying because of police threats against him. In response to counsel's questions, Walls admitted that the police threatened to break down the door to his mother's house and to "kick [his] butt" if he declined to respond to questions about Clark's murder. Tr. 3-78 to 3-79. Petitioner's counsel also suggested through his questions that Walls had told the police three different stories about the crime and that the police were putting words into his mouth. Tr. 3-79 to 3-83. Furthermore, petitioner's counsel attempted to elicit testimony from Walls suggesting that petitioner's nephew, Charles Durham, was the murderer. Walls said that he had been friends with Charles Durham for 15 years, Tr. 3-74, and he admitted that Charles Durham had arranged for Walls to purchase a green station wagon — later identified as the getaway car — and to put the title in Walls' name, Tr. 3-74 to 3-75. Walls also admitted that Charles Durham drove the car more than petitioner did. Tr. 3-75 to 3-77.

In addition to the preceding lines of questioning, petitioner contends that he should also have been allowed to ask Walls whether state drug charges against Walls had been dismissed in exchange for Walls' testimony against petitioner. Petitioner asked Walls if he had been arrested

for possessing cocaine shortly before Clark's murder, and Walls admitted before the jury that he had been arrested on that charge. Tr. 3-83. But the government objected to further cross-examination concerning the state charges (the cocaine charge and a marijuana possession charge). Following a hearing without the jury present, the district court barred petitioner from questioning Walls about the state drug charges on the ground that there was no evidence that any arrangement had been made to dismiss Walls' drug charges in exchange for his testimony. Tr. 3-103, 3-105.

On the facts of this case, the district court's ruling did not violate petitioner's rights under the Confrontation Clause of the Sixth Amendment. Petitioner's counsel argued to the district court that although evidence regarding the drug charges against Walls would not otherwise be admissible, counsel should be permitted to introduce that evidence "if those particular charges were in fact dismissed or held in abeyance or if someone, some deal or promise was made by any law enforcement officials as a result of his giving testimony here today." Tr. 3-84. After arguing that the dispositive question was whether there was any "deal or promise" by the government, petitioner's counsel agreed to have that issue explored outside the jury's presence. Tr. 3-84.

At that hearing, the federal prosecutor denied that the state charges were dropped in exchange for Walls' testimony in this case, Tr. 3-85, and petitioner's counsel admitted that he had no evidence of any such agreement between the prosecutor and Walls, *ibid*. In addition, Walls repeatedly denied that he had made any "deal" with either state or federal law enforcement officers linking his testimony in this case with the disposition of the state charges against him. See Tr. 3-87, 3-88, 3-89, 3-90, 3-95, 3-97. Thus, the evidence elicited at the hearing conclusively

answered the only point raised by counsel for petitioner in arguing the admissibility of evidence regarding Walls' state drug prosecution.

Petitioner now argues, Pet. 8-9, that he should have been able to explore the circumstances surrounding Walls' state prosecution even in the absence of evidence that there was an agreement between Walls and the State regarding Walls' testimony in the federal case. The evidence should have been admitted, petitioner now argues, because even in the absence of a formal agreement, Walls might have believed that he would be treated favorably in his state case if he testified favorably for the prosecution in this case. Petitioner, however, failed to make that argument before the district court. His argument, instead, was that the fact that the state charges were ultimately dismissed constituted a "prima facie showing" that Walls received some benefit as a result of his cooperation with law enforcement officials in connection with this case. Tr. 3-104 to 3-105.

The district court properly rejected the argument on which petitioner's counsel relied. The evidence elicited at the hearing outside the presence of the jury failed to establish any link at all between the dismissal of the state charges and Walls' cooperation in this case. And because petitioner failed to argue before the district court the point he now presses — that the evidence regarding the state drug charges should have been admissible even if there was no "deal" between Walls and State — the district court cannot be faulted for having failed to admit the evidence on that theory.

Petitioner argues, Pet. 5-6, as he did before the district court, that Walls admitted that there was a linkage of sorts between the two cases when he stated that at some point during the pendency of the state charges, law enforcement officials told him "they were going to go down and get it

taken care of and keep it." Tr. 3-88. Further testimony on that point, however, made it clear that what Walls was referring to was not the disposition of the state charges — and certainly not the disposition of those charges contingent on his cooperation in this case — but the question of his obligation to appear in state court for a particular court date. As Walls explained, shortly after he began cooperating with law enforcement authorities in connection with this case, he received a threatening telephone call. Tr. 3-88. In response to that threat, federal agents arranged to move Walls out of the State for a period of time to protect him. When Walls asked whether his departure would relieve him of his obligation to meet a court date in the state case against him, he was told that the court date would be "taken care of" by having it rescheduled. Tr. 3-93, 3-99 to 3-100; see also Tr. 3-88, 3-92, 3-98. Under these circumstances, it was entirely reasonable for the district court to conclude that there was no evidence to support petitioner's theory that any "deal" was made between Walls and either the state or federal government, Tr. 3-103. It was therefore reasonable for the court to refuse to permit petitioner to elicit the details of the drug charges against Walls, a matter that would otherwise be inadmissible under the Rules of Evidence. See Fed. R. Evid. 608(b).

None of the cases on which petitioner relies is contrary to the decision in this case. This Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), is inapposite because in that case it was conceded that there was an agreement to dismiss charges against the witness in exchange for his cooperation with the government; the trial court had excluded the evidence of that agreement because the witness had testified, outside the presence of the jury, that the State's promise had not affected his testimony. Both the Delaware Supreme Court and this

Court held that the evidence should have been admitted. In so ruling, this Court emphasized that the agreement was conceded, and that the jury could well have concluded that it furnished the witness a motivation for favoring the prosecution in his testimony, even though he insisted that the agreement had no such effect. 475 U.S. at 679. This case is entirely different from *Van Arsdall*, since in this case there was no evidence of any such agreement.

The Fifth Circuit's decision in *Carrillo v. Perkins*, 723 F.2d 1165 (1984), is likewise unhelpful to petitioner. In that case, the State's chief witness was exposed to possible prosecution on state felony charges unrelated to the subject matter of his testimony, and the witness admitted that he "thought about his exposure to prosecution for this offense while testifying against [the defendant]." 723 F.2d at 1167. The court of appeals held that under those circumstances it was error for the trial court to bar the defendant from eliciting before the jury the evidence regarding the witness's exposure to other charges. In so holding, however, the court emphasized two features of the case that are not present here: first, the witness in *Carrillo* admitted that he "thought about his exposure to prosecution" while he was testifying for the State; and second, the same sovereign that had the potential charges against the witness was using the witness at trial. See 723 F.2d at 1169-1170. In fact, the Fifth Circuit in *Carrillo* distinguished several of its own prior decisions on the ground that the government witnesses in those cases were not subject to prosecution by the same sovereign that was prosecuting the defendants. The government witnesses in those cases, the *Carrillo* court pointed out, "were witnesses in federal cases who were shielded from cross-examination regarding prior arrests by a state and a foreign

country.” 723 F.2d at 1170. Even in the Fifth Circuit, then, it would not have been error for the district court to exclude the evidence regarding Walls’ state prosecution.¹

Even if the district court’s restriction on petitioner’s cross-examination of Walls was error, the error was harmless. See *Delaware v. Van Arsdall*, 475 U.S. at 681-684 (holding that Confrontation Clause violations are subject to harmless error analysis). Because of the strength of the case against petitioner and the relatively minor role played by Walls in the case, the exclusion of the evidence regarding Walls’ state prosecution could not have prejudiced petitioner.

Walls was not an important witness against petitioner. Eyewitnesses gave very damaging testimony about petitioner’s activities before, during, and after the shooting, and two witnesses testified that petitioner admitted that he had killed Clark. Gov’t C.A. Br. 1E-1G. In contrast to the devastating eyewitness and admission testimony against petitioner, Walls’ testimony concerned collateral matters that were corroborated by other evidence. Thus, Walls testified that he had once overheard petitioner tell Charles Durham that “the mailman” owed him money, and he testified that petitioner had used the green station wagon on the day Clark was murdered.

¹ In *United States v. Mayer*, 556 F.2d 245 (1977), and *United States v. Onori*, 535 F.2d 938 (1976), the Fifth Circuit stated that a witness may be impeached not only if a “deal” exists with respect to his testimony, but also if he believes that there is any such “deal.” In this case, however, the evidence at the hearing outside the jury’s presence was unequivocal on that point: there was nothing to suggest that Walls believed that he stood to benefit, with respect to his state prosecution, from any testimony he might give in the federal case. Moreover, as we have noted, petitioner’s counsel did not argue this theory of admissibility to the district court, so it cannot now be offered as a basis for reversal.

Tr. 3-68 to 3-69. That testimony was corroborated by the testimony of Charles Durham, who said that petitioner told him that Clark owed him money and that petitioner had used the green car on the day of Clark's murder. Tr. 3-146, 3-151. Finally, despite the district court's ruling, petitioner elicited Walls' admission that charges were pending against him before the murder (and thus before he began cooperating with the government in connection with the murder investigation). Tr. 3-83. The jury therefore was aware of the state charges against Walls that petitioner claims gave Walls an incentive to testify falsely against him. Under these circumstances, the court of appeals was correct in concluding that the district-court's ruling did not prejudice petitioner.

2. Petitioner contends that the district court erred in permitting the government to elicit hearsay evidence from a defense witness. Pet. 10-12. During the defense case, petitioner attempted to show that Clark was killed by someone other than petitioner. Defense witness George Walker, a post office employee, testified that on several occasions, including the day of the murder, an unidentified person approached him and asked Walker to have Clark contact him. On cross-examination, the government asked Walker the identity of the person who had approached him. Walker testified that he had been told that the person was either a landlord or a realtor. The district court overruled petitioner's hearsay objection to Walker's testimony on cross-examination.

The court of appeals held, Pet. App. A4, that by eliciting evidence that somebody was looking for Clark and thereby suggesting that someone other than petitioner had committed the murder, petitioner "opened the door" for the prosecutor to erase that false impression by eliciting evidence from that same witness that the person looking for Clark was only interested in a real estate transaction.

While the admission of the evidence of the unknown person's identity may well have served the interests of fairness by completing the very incomplete picture that petitioner's evidence presented, we concede that the evidence of the unknown person's identity was inadmissible as hearsay. Nonetheless, the admission of that evidence was harmless error. The case against petitioner was strong and consisted of both direct and circumstantial evidence. The defense that the "unknown person" may have committed the murder was based on nothing more substantial than the fact that someone other than petitioner was asking about Clark at about the time he was killed. The George Walker testimony thus provided only weak support for the "other killer" hypothesis. In any event, however, to the extent that the George Walker testimony had any force, it was not significantly undercut by the government's evidence that the unknown person was a landlord or a realtor. Anyone asking about Clark for the purpose of arranging to kill him presumably would not disclose his true purpose; since such a person might logically claim some innocent purpose such as a real estate transaction, the government's evidence on this point did not deprive petitioner of whatever benefit petitioner might have obtained from the George Walker testimony.

3. Petitioner maintains that the government failed properly to authenticate a threat letter and that a copy of the letter should not have been admitted into evidence in lieu of the missing original letter. Pet. 12-14. During the government's case, Odessa Clark, the victim's mother, testified that about one year before the shooting she received a letter from a man whom she could no longer identify. The letter, which was addressed to "K.C." from "Ricky," advised "K.C." to pay his debt of \$1,500 because a "warrant is out for your head." After the shooting, Odessa Clark gave the letter to the police, who kept the original

and gave a xerox copy to the victim's sister. Before trial, the police lost the original. At trial, the district court admitted the copy into evidence over petitioner's objection.

a. Contrary to petitioner's contention, this issue does not really raise a question of authentication. The government represented the letter to be one Mrs. Clark received, sent to "K.C." from "Ricky." Mrs. Clark's testimony amply authenticated the letter by establishing that it was the letter she received. The question, instead, is one of conditional relevance. See Fed. R. Evid. 104(b). That is, the letter was relevant if, but only if, the finder of fact concluded that "K.C." was the victim, Kenneth Clark, and "Ricky" was petitioner, Ricky Durham. If the jury could find those conditions satisfied by a preponderance of the evidence, the letter was properly admitted. See *Huddleston v. United States*, 485 U.S. 681 (1988).

The evidence was clearly sufficient to support a jury finding on both issues. That a letter addressed to "K.C." and sent to the Clark home was intended for Kenneth Clark was certainly a reasonable inference, particularly in light of the evidence regarding Clark's involvement in the drug trade. The fact that Clark showed the letter to an associate of his is also strong evidence that the letter was sent to and intended for Clark. See Gov't C.A. Br. 1D. Similarly, there was sufficient evidence from which the jury could conclude that the threat letter was written by petitioner.² Clark had purchased cocaine from petitioner, and petitioner had been heard to say that Clark owed him money. Petitioner on one occasion instructed his nephew Charles Durham to get money from Clark. Petitioner later told Charles Durham that petitioner would have to "hurt" Clark if Clark did not pay his debt. The letter itself

² Petitioner refused to give handwriting exemplars in spite of a court order to do so. Tr. 3-229.

referred to the debt and was signed "Ricky," which is petitioner's first name.

b. Petitioner also had no basis for objecting to the introduction of a copy of the threat letter rather than the original. Clark's mother and sister, each of whom had read the original letter, both testified that the copy accurately reflected the contents of the original letter, and there was no contrary evidence on that point. The district court therefore properly admitted the copy of the letter in lieu of the missing original. See Fed. R. Evid. 1003; *United States v. Chan An-Lo*, 851 F.2d 547, 557-558 (2d Cir.), cert. denied, 109 S. Ct. 493 (1988); *United States v. Leight*, 818 F.2d 1297, 1305 (7th Cir.), cert. denied, 108 S. Ct. 356 (1987).

4. Petitioner claims that the district court should have granted his motion for a mistrial, because the prosecutor in his opening statement referred to evidence that the district court subsequently ruled inadmissible. Pet. 14-16. In his opening statement, the prosecutor stated that the evidence would show that Clark called petitioner after receiving the threatening letter. In that telephone call, Clark allegedly told petitioner that he would pay petitioner his money, but that petitioner should stay away from Clark's mother. During the government's case-in-chief, a government witness testified that Clark "went to call 'Ricky' " after receiving the threatening letter. The district court upheld petitioner's objection that the witness's identification of "Ricky" was inadmissible and struck that portion of his testimony. Gov't C.A. Br. 17-19. Petitioner then renewed his motion for a mistrial based on the prosecutor's reference to that evidence in his opening statement. The district court denied the motion, but it instructed the jury that the opening statements were not evidence.

A prosecutor's reference to evidence that is later found inadmissible does not warrant a mistrial if the evidence is not central to the case and the trial court issues a curative instruction. In *Frazier v. Cupp*, 394 U.S. 731 (1969), the Court held that a prosecutor's recital in his opening statement of evidence that the trial court subsequently ruled inadmissible was not grounds for a mistrial. The Court reasoned that the prosecutor merely summarized objectively the evidence that he reasonably expected to produce and did not emphasize that the evidence later held inadmissible was crucial to the prosecution's case. Furthermore, the trial court had instructed the jury that the arguments of counsel in their opening statements are not evidence. 394 U.S. at 733-737. The courts of appeals likewise consider the likely impact of the prosecutor's remarks and the trial court's curative actions in determining whether a mistrial is warranted in such circumstances. See *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988); *United States v. Tolman*, 826 F.2d 971, 973-974 (10th Cir. 1987).

In this case, the district court correctly denied petitioner's renewed motion for a mistrial. In his opening statement, the prosecutor merely told the jury what he reasonably expected the evidence to show, and he did not highlight the identification evidence that the district court subsequently ruled inadmissible. Moreover, the court gave a cautionary instruction to the jury, advising it that the prosecutor's comment did not constitute evidence. Under these circumstances, it is extremely unlikely that the prosecutor's comments in his opening statement prejudiced petitioner. Indeed, to the extent that any of the jurors even recalled the opening statements by the time they retired for deliberations, the government's failure to offer evidence with respect to a point made in its

opening statement probably worked to the disadvantage of the government, not the defense.

5. Finally, petitioner contends that the district court erred in permitting the government to impeach a defense witness with her prior inconsistent statement and in failing to instruct the jury to consider that statement for impeachment purposes only. Pet. 17-18. During the defense case, petitioner sought to explain that he fled from St. Louis after the shooting because law enforcement agents threatened to kill him. Norma Ross, a defense witness, testified on direct examination that law enforcement agents had told her that they would kill petitioner and that she had advised petitioner of those threats. On cross-examination, Ross denied having told Postal Inspector Post that she feared that petitioner would kill both her daughter and petitioner's nephew, and that she had discussed the idea of placing her daughter in protective custody. In rebuttal, Inspector Post testified that Ross had told him that petitioner was dangerous. The district court admitted Post's testimony for impeachment purposes only, but it did not give a limiting instruction to that effect to the jury. Petitioner neither requested a limiting instruction nor objected to the court's failure to give one. Gov't C.A. Br. 19-23.

The prosecutor properly cross-examined Ross and offered rebuttal evidence concerning the pretrial statement in which Ross expressed her fear of petitioner, because that evidence showed a clear motive for Ross to testify favorably to the defense. See, e.g., *United States v. Stockton*, 788 F.2d 210, 219-220 (4th Cir.), cert. denied, 479 U.S. 840 (1986); *United States v. Cerone*, 452 F.2d 274, 288 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); *United States v. Briggs*, 457 F.2d 908, 910-911 (2d Cir.), cert. denied, 409 U.S. 986 (1972). While petitioner would have been entitled to a limiting instruction on request, the dis-

district court was not required to instruct the jury, sua sponte, to consider Ross's prior inconsistent statement solely for impeachment. Rule 105, Fed. R. Evid., requires a trial court to give a limiting instruction in appropriate circumstances upon request by a party. Because petitioner did not request a limiting instruction, the district court had no duty to give one. See *United States v. Spetz*, 721 F.2d 1457, 1476-1477 (9th Cir. 1983); *United States v. Russell*, 712 F.2d 1256, 1258-1259 (8th Cir. 1983). See also *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (counsel bears primary responsibility for ensuring that jury is given proper limiting instruction). Petitioner argues, Pet. 18, that the court's failure to give a limiting instruction constituted "plain error" that led to a miscarriage of justice. That assertion, however, is unconvincing in light of the minor role played by the witness Ross and the compelling evidence of petitioner's guilt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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